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CHARLES ELMORE GROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 491

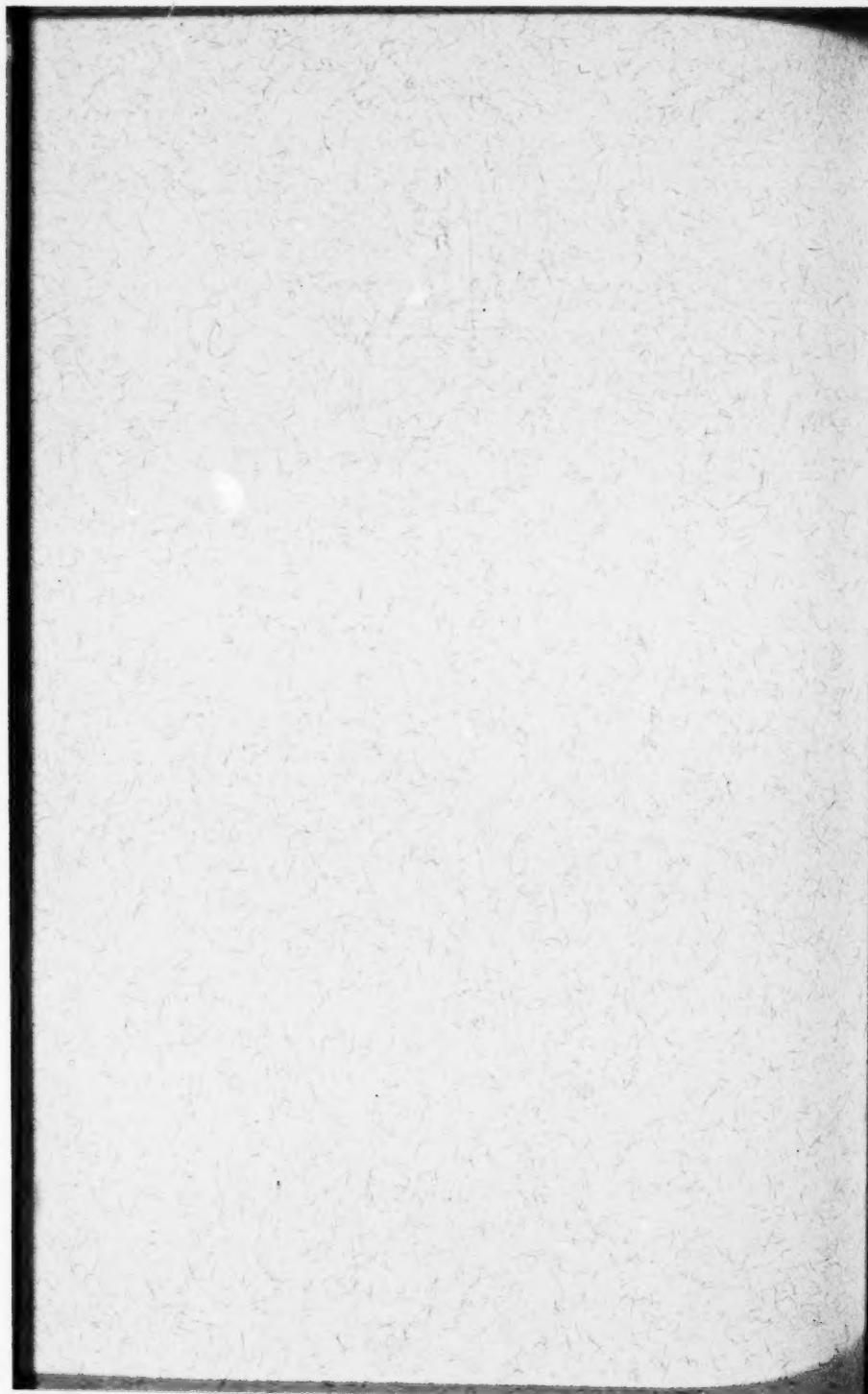
BENGUET CONSOLIDATED MINING COMPANY
(A CORPORATION),

Petitioner,
vs.

IDONAH SLADE PERKINS, SAMUEL I. HARTMAN
AS RECEIVER, HARTFORD BEAUMONT AND GEORGE
A. FERRIS.

PETITION FOR A WRIT OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF THE STATE OF
CALIFORNIA FOR THE FIRST APPELLATE DIS-
TRICT, DIVISION ONE, AND MOTION AS TO REC-
ORD.

W. H. LAWRENCE,
ALFRED SUTRO,
FRANCIS R. KIRKHAM,
Counsel for Petitioner.



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**PETITION FOR A WRIT OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF THE STATE OF
CALIFORNIA FOR THE FIRST APPELLATE DIS-
TRICT, DIVISION ONE.**

*To the Honorable, the Chief Justice of the United States,
and the Associate Justices of the Supreme Court of the
United States:*

Your petitioner, Benguet Consolidated Mining Company, prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California for the First Appellate District, Division One, entered in the above case on September 21, 1943, affirming the judgment of the Superior Court of the State of California in and for the City and County of San Francisco.

Preliminary Statement.

This is a companion case to the case bearing the same title and numbered No. 968, October Term 1942. That case sought review of a judgment entered by the District Court of Appeal of California at an earlier stage in this action. A petition for a writ of certiorari therein was denied by this Court on June 14, 1943. A petition for rehearing of that order has been filed and is now pending before this Court. The judgment sought to be reviewed in that case is one which disposed of all issues of law but reversed for further proceedings in the trial court. These further proceedings have now been had and a new judgment entered on modified findings. Petitioner, not certain which judgment would be held to be the final judgment within the meaning of section 237(b) of the Judicial Code, applied for certiorari to review the first judgment of the District Court of Appeal before the expiration of three months from the date of that judgment. The present petition seeks review of the judgment of the District Court of Appeal affirming the second judgment.

If, as we believe, this case presents questions of such public importance and novelty that they should be resolved by this Court, and if there be doubt whether the first or the second judgment of the District Court of Appeal is final and reviewable, then the contemporaneous submission of both applications—the first by the pending petition for rehearing and the second by this petition—will enable this Court to base its jurisdiction upon whichever judgment it deems the final one, or upon both.

We respectfully ask the Court to consider this petition and the petition for rehearing in No. 968, October Term 1942, together. The jurisdictional questions involved are discussed in that petition for rehearing and we respectfully refer the Court to that discussion.

Opinions Below.

The Superior Court rendered no opinion; its original findings of fact, conclusions of law and judgment are at R. 77, 119. The opinion of the District Court of Appeal on the first appeal (R. 798) is reported in 55 Cal. App. (2d) 720, 132 Pac. (2d) 70; the majority and dissenting opinions on denial by that court of a motion for rehearing on the first appeal (R. 849, 850) are reported in 55 Cal. App. (2d) 774, 132 Pac. (2d) 102. The order of this Court denying petitioner's former petition for a writ of certiorari is reported at 318 U. S. —, 63 S. Ct. 1435.

The Superior Court's modified findings of fact and conclusions of law, made pursuant to the mandate of the District Court of Appeal, are at R. 856, and the new judgment of the Superior Court at R. 860. The opinion of the District Court of Appeal on the second appeal (R. 865) is reported in 60 A. C. A. 594, 141 Pac. (2d) 19 (advance sheets).

The Supreme Court of California on both appeals denied a hearing without opinion (R. 851, 867).

Jurisdiction.

The judgment sought to be reviewed on this petition (R. 866) was filed September 21, 1943. The Supreme Court of California denied a hearing October 25, 1943 (R. 867).

The jurisdiction of this Court is invoked under section 237(b) of the Judicial Code, as amended by the Act of February 12, 1925.

The District Court of Appeal affirmed the judgment of the Superior Court on the second appeal solely on the authority of its decision and opinion on the first appeal. The federal questions sought to be reviewed, and the timely manner in which they were raised in the courts below, are set forth in the petition for a writ of certiorari in No. 968, October Term 1942, which seeks a review of the decision

rendered by the court below on the first appeal. The relationship of that case to this one has been pointed out (*supra*, p. 2). All of the federal questions raised on the first appeal were again urged in the courts below on the second appeal.* This Court has jurisdiction to consider these questions on this petition (*Gant v. Oklahoma City* (1933), 289 U. S. 98, 100, 101).

The question whether the judgment of the court below on the first appeal (sought to be reviewed in No. 968, October Term 1942), or its judgment on the second appeal (sought here to be reviewed), is the final and reviewable judgment within the meaning of section 237 (b) of the Judicial Code is discussed in the petition for rehearing in No. 968, October Term 1942 (pp. 2-5).

Statement of the Case.

As above pointed out, this petition seeks review of the decision and judgment of the District Court of Appeal rendered upon a second appeal, and that decision and judgment was rendered solely upon the authority of the decision of the same court on the first appeal (R. 865). No additional facts pertinent to the federal questions were added to the record on the proceedings in the state courts subsequent to the decision on the first appeal. All of the facts pertinent to these questions, therefore, are stated in our petition for a writ of certiorari in No. 968, October Term 1942 (p. 4, et seq.), and we respectfully refer the Court to that statement.

The Philippine Islands remain in enemy occupation; con-

* Under the California practice an appeal is taken merely by notice (R. 863) and there are no assignments of error. The questions presented on appeal are stated only in the briefs. The second appeal in this case was heard, by stipulation of all parties (R. 865), on the briefs on the former appeal.

sequently the Philippine action related to this case remains undetermined (see Petition for Rehearing in No. 968, October Term 1942, pp. 7-9).

Questions Presented.

For the reasons above stated the questions presented on this petition are identical with those presented in our petition in No. 968, October Term 1942, and set forth at pages 11-12 of that petition. We respectfully refer the Court to that statement.

Reasons Relied On for the Issuance of the Writ.

I.

The Decision of the Court Below Holding Petitioner Concluded by a Judgment to Which It Was Neither Party Nor Privy Deprives Petitioner of Its Property Without Due Process of Law and Is in Conflict With Controlling Decisions of This Court.

II.

The Decision of the Court Below Denies Full Faith and Credit to the Philippine Adjudications in Violation of Section 905 of the Revised Statutes, and in So Ruling Misapplies the Decision of This Court in Treinies v. Sunshine Mining Co., 308 U. S. 66.

III.

The Decision of the Court Below Denies to the New York Judgment the Same Faith and Credit It Has by Law and Usage in New York, Contrary to the Full Faith and Credit Clause and to the Decisions of This Court.

For the argument in support of the foregoing reasons we respectfully refer the Court to the argument in our

petition for a writ of certiorari (pp. 12-24) and petition for a rehearing (pp. 3-13) in No. 968, October Term 1942.

Conclusion.

For the reasons above stated and referred to we respectfully submit that the petition for a writ of certiorari in this case, and the petition for rehearing in No. 968, October Term 1942, should be granted.

Dated: October —, 1943.

W. H. LAWRENCE,
ALFRED SUTRO,
FRANCIS R. KIRKHAM,
Attorneys for Petitioner.

We respectfully call the Court's particular attention to a special case note on the decision of the District Court of Appeal in the instant case, written by Professor Warren A. Seavey of the Harvard Law School and appearing in the current issue of the Harvard Law Review (October, 1943; 57 Harv. L. Rev. 98). The note reviews the principles involved, emphasizes their public importance, and points out that the decision of the court below clearly denies due process in so far as it holds that the New York judgment is binding upon petitioner, a non-party, in respect of dividends paid prior to the date of that judgment.

